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Comments of America Online, Inc.  
CC Docket No. 96-262  
Further Notice  
June 26, 1997

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Transport Rate Structure and Pricing	)	CC Docket No. 91-213
	)	
End User Common Line Charges	)	CC Docket No. 95-72
	)	

**COMMENTS OF AMERICA ONLINE, INC.**

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Dated: June 26, 1997

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**COMMENTS OF AMERICA ONLINE, INC.**

America Online, Inc. ("AOL"), by its attorneys, hereby submits its comments in the Further Notice of Proposed Rulemaking ("Further Notice" or "FNPRM") released on May 16, 1997, regarding the issue of whether presubscribed interexchange carrier charges ("PICCs") may be assessed on special access lines.<sup>1/</sup>

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<sup>1/</sup> In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, and End User Common Line Charges, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, FCC 97-158, at ¶¶ 397-406 (rel. May 16, 1997) ("Access Charge Reform Order").

## INTRODUCTION AND SUMMARY

As the world's leading provider of Internet online services,<sup>2/</sup> AOL has a strong interest in ensuring that its members receive service in an efficient, reliable, and economical manner without regard to the underlying technology used. As the vast majority of AOL's subscribers are consumers who use its services for recreation, personal information, and entertainment, AOL is particularly concerned with ensuring that it can deliver its services to consumers in an economically efficient manner in urban, suburban and less-densely populated areas. In order for it to achieve its goals in this area, AOL requires a competitive supply of telecommunications services from a diversity of sources.

While AOL believes that the emergence of robust competition is critical to creating an environment with the affordable and ubiquitous data-friendly services needed to sustain the emerging Internet online services market, AOL and other Internet Service Providers ("ISPs") have, to date, been largely dependent upon incumbent local exchange carriers ("LECs"), whose networks consist of voice circuitry that is not designed to accommodate efficiently the needs of ISPs. With respect to special access services, AOL currently relies heavily on incumbent LECs to deliver traffic within the LECs' service areas from various carriers' local points of presence to AOL's network termination points.

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<sup>2/</sup> Founded in 1985, AOL serves approximately 8 million members and provides local dial-up access to consumers for its service in roughly 700 cities worldwide. AOL provides consumers with original programming and informative content, E-mail and access to the World Wide Web and information databases, electronic magazines and newspapers, and opportunities to participate in online "chat" conferences, which collectively offer an interactive community that enhances learning, personal communication, and productivity.

The FNPRM proposes the creation of a new, non-cost-based PICC subsidy for special access lines. The Commission should reject this proposal as inconsistent with the economic costing principles and pro-competitive environment that the Telecommunications Act of 1996 ("1996 Act") and the Commission are trying to establish. In addition, imposing a new special access PICC is contrary to the Commission's efforts to institute an access charge reform framework premised on cost-based rates and efficient rate structures. It is also an unwarranted departure from established Commission precedent that special access services should not subsidize other services. Finally, because ISPs such as AOL rely upon special access lines to bring Internet online services to consumers, imposing a new non-cost-based PICC subsidy on special access could be detrimental to the continued development and growth of the Internet and to Internet online end users who have likely already been required to bear considerable increased costs as a result of the Commission's access charge restructuring plan.

**I. THE FCC SHOULD PROMOTE ECONOMICALLY RATIONAL CHARGES TO THE MAXIMUM EXTENT FEASIBLE AS CONTEMPLATED BY THE 1996 ACT**

**A. Creating a New Non-Cost-based PICC for Special Access Lines Is Contrary to Sound Economics, Robust Market-Driven Competition, and the 1996 Act**

In passing the 1996 Act, Congress sought to establish "a pro-competitive, deregulatory national framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans."<sup>3/</sup> Imposing a new non-cost-based PICC on special access lines, however, could interfere with this goal by

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<sup>3</sup> S.Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

sending distorted signals to the competitive marketplace regarding the costs of these services and the sustainability of genuine competition.

Indeed, the Commission has repeatedly recognized that in order to fulfill the pro-competitive purposes of the 1996 Act, it must adopt regulatory structures that replicate the conditions of a competitive marketplace and the prices that would prevail in such a marketplace to the maximum extent practicable.<sup>4/</sup> To this end, the Commission has acknowledged that cost and pricing rules must reflect cost causation.<sup>5/</sup> There is no reason for the Commission to stray from these core economic principles for special access services.

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<sup>4/</sup> See Access Charge Reform Order at ¶¶ 13, 35; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 at ¶ 8 (1996) ("Interconnection Order"), Order on Reconsideration, CC Docket No. 96-98, 11 FCC Rcd 13042 (1996) ("Interconnection Reconsideration Order"), petition for review pending and partial stay granted, sub nom. Iowa Utilities Board et al. v. FCC, 109 F.3d 418 (8th Cir. 1996) (access charge reform necessary because "it is widely recognized that because a competitive market drives prices to cost, a system of charges which includes non-cost-based components is inherently unstable and unsustainable."); In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switched Network by Information Service and Internet Access Providers, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, Notice of Proposed Rulemaking and Third Report and Order, FCC No. 96-488 at ¶¶ 14, 49, 55-56 (rel. Dec. 24, 1996) ("NPRM") (because previous access charge rules compelled incumbent LECs "to impose charges for access services in a manner that does not accurately reflect the way those LECs incur the costs of providing those services," the "rate structure rules do not send accurate pricing signals to customers, and consequently, encourage inefficient use of telecommunications services . . . . These inaccurate pricing signals . . . could very well skew or limit the development of competition in the markets for telecommunications services."). See also 47 U.S.C. § 252(d) (mandating cost-based rates for interconnection, unbundled elements, and transport and termination); 47 U.S.C. § 254(k) (barring cross-subsidization of services and requiring reasonable allocation of joint and common costs).

<sup>5/</sup> Access Charge Reform Order at ¶¶ 35-36.

It is for this reason that special access arrangements have been subject to tariff and are priced on a cost-causative basis, consistent with the statutory requirement that all such rates be just and reasonable.<sup>6/</sup> The Commission has gone to great lengths to monitor special access rates for conformity with such requirements, repeatedly reviewing rate and cost issues related to special access.<sup>7/</sup>

As the Commission concedes in the FNPRM,<sup>8/</sup> the proposal to impose a new PICC for special access lines is inappropriate because it would require special access users to bear the costs of investment and expenses associated with services and facilities that are wholly unrelated to providing special access.<sup>9/</sup> Specifically, the FNPRM proposal would permit price cap LECs to assess one or more PICCs on special access lines at the same level as the PICC imposed upon multi-line business customers for switched access.<sup>10/</sup> While the Commission acknowledges these

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<sup>6/</sup> 47 U.S.C. §§ 201(b) and 202(a).

<sup>7/</sup> See, e.g., In the Matter of Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, Memorandum Opinion and Order, FCC 86-52, 1986 WL 291617 (F.C.C.) at ¶ 1 (released January 24, 1986) (reviewing Commission's efforts to monitor special access rates and expressing intention to engage in "continued oversight and fine-tuning").

<sup>8/</sup> FNPRM at ¶ 404.

<sup>9/</sup> Indeed, it is uncertain whether many of these costs are legitimately recovered at all. See, e.g., "MCI Files First Challenge to FCC's Access Charge," Communications Daily (June 18, 1997) at 2 (discussing suit by MCI, who argues Access Charge Reform Order did not go far enough and Commission should adopt rules requiring up-front reduction in access charges of \$10 billion); see also MCI Telecommunications Corp. v. FCC, (D.C. Cir. filed June 18, 1997) (petition for review of Access Charge Reform Order).

<sup>10/</sup> FNPRM at ¶ 403. The FCC proposes that its special access PICC would not recover transport interconnection charges ("TIC") or marketing expenses. Id.

substantial new fees would not be based on economic costs,<sup>11/</sup> it argues that these charges are warranted to stem the feared migration of some business customers from switched access service to special access as a result of the changes adopted in the Access Charge Reform Order.<sup>12/</sup>

While such a scenario, with the associated loss of revenue from PICCs and subscriber line charges ("SLCs") from multi-line business customers could theoretically warrant a future examination of the FCC's new access reform rules, wholly unsupported speculation about potential business customer migration does not now justify the creation of a non-cost-based PICC applicable to special access users. In fact, this new "bypass" fear is reminiscent of the dire predictions that were made when the Commission adopted its original access charge rules and phased in the original subscriber line charge.<sup>13/</sup> Significantly, however, at that time the incumbent LECs retained the vast majority of switched access traffic and are likely to do so for the foreseeable future. Moreover, to the extent more economic competitive alternatives are being used, the Commission should embrace, not deter, them.

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<sup>11/</sup> Id. at ¶ 401.

<sup>12/</sup> Id.

<sup>13/</sup> See, e.g., "Closed-End WATS Is Major Issue; BOCs Ask Commission For New Switched Access Rules," Communications Daily (February 11, 1985) at 5 ("Telcos argue that bypass is encouraged by pricing WATS on usage basis and considering it as Special Access, as FCC rules now mandate. Telcos said usage-sensitive rate 'artificially increases' cost [of] WATS, compared with special access or totally private bypass system, and results in strong incentive to bypass switched access in favor of those alternatives."); see also "AT&T-IS Disputes Claims Resale Would Accelerate Local Bypass," Communications Daily (August 24, 1984) at 3; "Cockroaches?; FCC Grilled At House Hearing," Communications Daily (February 9, 1984) at 2 (quoting Mark Fowler as arguing that bypass is "somewhat like a cockroach. You see the infestation all over the country").

Simply put, the 1996 Act seeks to eliminate subsidies and impediments to market-based rates rather than create new ones<sup>14/</sup> and the Commission should not stray from that principle in the context of special access. While AOL does not question that the Commission can and should consider important public policy goals such as universal service and network sustainability, the 1996 Act generally disfavors subsidies and instead relies upon competition as the primary mechanism to achieve goals where possible.<sup>15/</sup> Indeed, the fundamental purpose of the access charge proceeding was to rationalize, and not distort, the structure of interstate cost recovery mechanisms,<sup>16/</sup> and the Commission should not stray from this course by appending arbitrary new subsidies to the rate system for special access services.<sup>17/</sup>

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<sup>14/</sup> See H.R. Rep. No. 104-458, 104<sup>th</sup> Cong., 2d Sess. at 113 (1996).

<sup>15/</sup> See, e.g., 47 U.S.C. Section 254(e).

<sup>16/</sup> Access Charge Reform Order, at ¶¶ 13, 35 (observing that proceeding is intended to conform rate structure more closely to cost-based principles).

<sup>17/</sup> FNPRM at ¶ 404; see also In the Matter of Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, Memorandum Opinion and Order, FCC 86-52, 1986 WL 291617 (F.C.C.) at ¶ 6 (released January 24, 1986) (noting Commission's policy that special access rates should be cost-based).

In fact, the only additional surcharge that may be applied to special access is a \$25 per month charge that may be assessed on users of voice grade special access lines capable of "leaking" traffic to the public switched network, such as those linked to a PBX which can connect the special access line to a local exchange line. See 47 C.F.R. Section 69.115(c). The FCC allows LECs to impose a \$25 special access surcharge to ensure that private line users pay a fair share of common line costs. See In the Matter of Annual 1989 Access Tariff Filings, Petitions for Waiver, 4 FCC Rcd 413, 414 (1989); In the Matter of Annual 1989 Access Tariff Filings, 4 FCC Rcd 3638, 3682 (1989).

**B. The Commission Should Not Undermine Its New Access Reform Plan  
By Creating Additional PICC Subsidies**

By its own terms, the Access Charge Reform Order was designed to implement a restructured access charge plan that would attain "economic efficiency."<sup>18/</sup> The FCC stressed that sound policy would not be served through the previous access charge regime premised upon non-cost-based rates and inefficient rates structures.<sup>19/</sup> The Commission, therefore, announced the new access charge reform plan on the theory that it would promote competition and ensure that market forces are unconstrained by artificial regulatory distortions to the greatest extent possible.<sup>20/</sup> To amend this new framework immediately by creating a non-cost-based PICC subsidy runs counter to the Commission's goals and, accordingly, should be rejected.

Further, although the Commission tentatively concludes that its PICC proposal "is necessary for [the] transition from the per-minute CCL to the flat PICC to work,"<sup>21/</sup> it provides no support for this assertion. In fact, the thrust of the hundreds of pages of the Commission's Access Charge Reform Order is that, taken as a whole, it will correct the market and economic distortions of the former regime. In fact, there is no suggestion in the Commission's Access Charge Reform Order that the new framework is predicated on additional special access PICC revenue. As the Commission itself stated, access costs can be expected to decrease as the rules

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<sup>18/</sup> See Access Charge Reform Order at ¶ 13; see also NPRM at ¶ 17.

<sup>19/</sup> Access Charge Reform Order at ¶ 32.

<sup>20/</sup> Id. at ¶ 42.

<sup>21/</sup> FNPRM at ¶ 404.

are implemented.<sup>22/</sup> While reams of economic data were in the record of the FCC's access charge docket, there is no estimate in the Access Charge Reform Order itself of any interim or long term revenue shortfall that must be recovered by creating additional charges on new users. Instead, the clear sense is that the new rules present a workable, comprehensive access reform plan.

Accordingly, the Commission's proposal for a new PICC is inconsistent with its own Access Charge Reform Order, which repeatedly suggests that the new access transition plan already provides mechanisms for cost recovery consistent with the public interest through continued per-minute charges to the extent that SLC and PICC revenues are insufficient to recover incumbent LEC costs.<sup>23/</sup> If the FCC now believes that the access charge reform plan it adopted does not serve the public interest or cannot work as constituted, the FCC should address those deficiencies directly by reconsidering or refining its plan in the future rather than by now creating an additional subsidy mechanism to be borne by special access users.

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<sup>22/</sup> See Access Charge Reform Order at ¶ 265. The FCC's own News Release states that the access charge reforms create an "access charge system that is economically efficient, fair, and compatible with competition," and repeatedly mentions the overall impact these reforms, standing alone, will have in the long and short term. See "Commission Reforms Interstate Access Charge System," Report No. CC 97-23, News Release, May 7, 1997, at 1-2, Attachment. See also Federal Communications Commission, "Commission Reforms Interstate Access Charge System," press release (May 7, 1997) (statement of Chairman Reed Hundt) ("as a result of today's decisions the overwhelming majority (of customers) will buy more communications services with their money or will pay less for the same services they buy today"); see also id. (statement of Commissioner Rachelle Chong) ("I believe our actions today . . . will bring about a drop in access charges").

<sup>23/</sup> See Access Charge Reform Order at ¶¶ 56-60, 64, 100, 239.

## **II. IMPOSING A NON-COST-BASED PICC UPON SPECIAL ACCESS LINES COULD ADVERSELY IMPACT THE DEVELOPMENT OF THE INTERNET ONLINE SERVICES INDUSTRY AND HARM INTERNET CONSUMERS**

To the degree that ISPs such as AOL rely on special access lines to bring Internet online services to consumers, increasing the costs of these services to ISPs by imposing a new PICC subsidy charge on special access lines could directly impact the continued growth and development of the Internet online industry, contrary to the 1996 Act and the Commission's articulated policies.<sup>24/</sup> Imposing this new charge would ultimately further burden Internet online end users, who are already being required to shoulder increased direct and indirect costs imposed by the Commission's Access Charge Reform Order. As AOL and other ISPs noted previously, the Commission's restructured access rules disproportionately burden the Internet industry.<sup>25/</sup>

For example, the Commission's restructured access plan imposes higher SLCs and PICCs on ISPs as multi-line business users, which can add millions of dollars to the costs ISPs must pay to bring services to consumers with no attendant savings on long distance costs.<sup>26/</sup> To increase

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<sup>24/</sup> See, e.g., 47 U.S.C. § 230(b) (added by 1996 Act § 509) (establishing policy against regulation of Internet on-line services); Access Charge Reform Order at ¶ 344.

<sup>25/</sup> See, e.g., Ex Parte Presentation of America Online, Inc. re: CC Docket No. 96-262 – In the Matter of Access Charge Reform (Notice of Proposed Rulemaking) at 2-3 (April 29, 1997) (“AOL Ex Parte Presentation”) (pointing out that requiring multi-line business customers such as ISPs to bear the burden of higher SLCs and PICCs is likely to suppress Internet demand and development and distort the market for Internet services as the result of uneconomic charges to ISPs).

<sup>26/</sup> See Access Charge Reform Order at ¶¶ 78, 91. Thus, while the Commission's restructuring of access charges may reduce long distance rates, ISPs will not benefit from these reductions since they do not originate traffic and make no long distance calls. See AOL Ex Parte Presentation, supra. Moreover, the Commission's new framework also depends on new charges on second lines, which many consumers use to access Internet online services.

these costs even further would compound the potential harm to the development and use of Internet online services. Given the exceedingly thin profit margins in the ISP business, it is reasonable to expect that these new rate increases will be passed on, at least to some extent, to consumers. Thus, rather than preserving and promoting the robustness and growth of the Internet, these new charges could create additional disincentives for the Internet's future use and development.

Currently, AOL and its service providers depend heavily on incumbent LECs to deliver traffic within the LECs' service areas from various carriers' points of presence to AOL's network termination points over special access lines, and will likely continue to do so, at least until economically competitive facilities for data traffic have more fully developed. Indeed, ISPs currently do not have widely available economic alternatives for a majority of their special access needs, especially where ISPs must make special access line arrangements outside major market centers. As AOL seeks to serve people all over the United States, it often has no choice but to purchase special access lines from incumbent LECs.

In sum, the Commission's restructured access charge plan already requires ISPs and their customers to bear substantial cost increases that are neither cost-based nor pro-competitive. The Commission's proposed new subsidy could unfairly penalize ISPs and harm consumers and the Internet online industry further by asking them to pay additional non-cost-based rates for incumbent LEC network services. This result must be avoided as it is contrary to Congress's

intention that market forces be permitted to drive investment and innovation in the Internet services market to the maximum extent feasible.<sup>27/</sup>

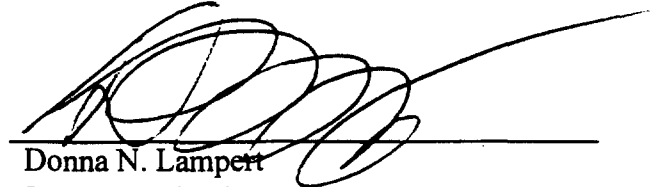
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<sup>27/</sup> See 47 U.S.C. Section 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").

## CONCLUSION

For the reasons described herein, the Commission should reject its proposal to impose a non-cost-based PICC subsidy on special access lines.

Respectfully submitted,



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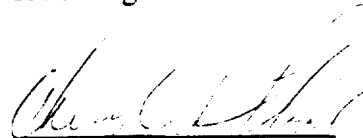
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Dated: June 26, 1997

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## CERTIFICATE OF SERVICE

I, Cheryl S. Flood, hereby certify that on this 26th day of June, 1997, I caused copies of the foregoing "REPLY COMMENTS OF AMERICA ONLINE, INC." to be sent first-class mail, postage prepaid, or to be delivered by messenger (\*) to the following:



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